

JUL 13 2015

Sherry R. Carter, Executive Officer/Clerk
By Gloria Barreras Deputy

1 JACKIE LACEY
2 District Attorney of Los Angeles County
3 DAN AKEMON (State Bar No. 180020)
4 GARRETT DAMERON (State Bar No. 202785)
5 MAJOR CRIMES DIVISION
6 210 W. Temple St., 18TH Floor
Los Angeles, CA 90012
(213) 257-2237
Attorney for Plaintiff

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

10 PEOPLE OF THE STATE OF CALIFORNIA,

Case No. SA068002

11 Plaintiff,

12 v.

13 MICHAEL THOMAS GARGIULO,

PEOPLE'S MEMORANDUM OF
POINTS AND AUTHORITES IN
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS PURSUANT
TO PENAL CODE § 995

14 Defendant.

Complaint Filed: June 10, 2008
Information Filed: July 14, 2010

15 Date: July 14, 2015
16 Time: 8:30 AM
Court: Department 108
Trial Date: Not Set

20 TO THE HONORABLE SAM OHTA, SUPERIOR COURT JUDGE, AND TO
21 CHARLES LINDNER AND DALE RUBIN, ATTORNEYS FOR DEFENDANT MICHAEL
22 THOMAS GARGIULO:

23 The People hereby oppose Defendant's Motion to Set Aside the Information under Penal
Code section 995 based upon the points of law and fact set forth in the attached Memorandum
24 of Points and Authorities and such arguments as the People may make at the hearing on said
Motion to Dismiss, as follows:

I. **INTRODUCTION**

Defendant Gargiulo (hereafter “Gargiulo”) is charged with two counts of murder with special circumstances, one count of attempted murder, three counts of burglary, and one count of attempted escape. It is also alleged pursuant to Evidence Code section 1101(b) that Gargiulo murdered a young woman, Tricia Pacaccio, under eerily similar circumstances in Chicago in 1993.¹ In the instant matter, Gargiulo was arrested and charged in Los Angeles in 2008 and the prosecution is seeking the death penalty.

Based on all of the facts and circumstances of the attacks on the four victims it is the prosecution's allegation that Gargiulo is a serial, sexual-thrill killer who engages in the systematic slaughter of beautiful women because he takes sexual pleasure from it. His *modus operandi* is to first identify a "target", acquaint himself with that victim, and then watch, stalk, and "hunt" down the victim relentlessly as part of his plan to kill. He collects real-time intelligence on the victims and then manipulates the circumstances to provide himself with the perfect opportunity to pounce and kill in blitz-type knife attacks and escape detection, all for his sexual gratification.

II.
CHRONOLOGICAL FACTUAL SUMMARY

A. The 1993 Tricia Pacaccio Murder (pursuant to EC 1101(b))

In the early morning hours of August 14, 1993, Tricia Pacaccio (hereafter "Ms. Pacaccio") was stabbed to death on the stoop of her family's home in Glenview, Illinois, which is near Chicago. Ms. Pacaccio was eighteen years old at the time – petite, attractive, outgoing,

¹ Gargiulo has been charged in Chicago for the murder of Tricia Pacaccio and a warrant for his arrest has been issued. He will be extradited to Illinois to stand trial there when these proceedings in Los Angeles are completed.

1 and popular among her classmates. She had spent the evening with a group of friends. It was a
2 festive gathering; they had all just graduated high school and they were bidding each other a
3 final farewell before heading off in different directions to college. Ms. Pacaccio was bound for
4 Purdue University in Indiana where she had earned an engineering scholarship. The evening
5 ended with hugs and kisses.
6

7 Ms. Pacaccio gave several friends a ride home that night. She dropped off her last
8 passenger at around 1:00 a.m., and then drove the few minutes to her parents' suburban house.
9 She parked her car and walked up to the side door of the house, key in hand. But Ms. Pacaccio
10 never made it inside. Instead, her father discovered her body on the doorstep the next morning.
11

12 As with the murders of Ms. Ashley Ellerin and Mrs. Maria Bruno, the attack on Ms.
13 Pacaccio was notable for the extreme violence of her attacker. Ms. Pacaccio was stabbed
14 numerous times, mostly in her upper left torso, and she suffered a spiral fracture to her left arm.
15 Investigators surmised that her attacker surprised Ms. Pacaccio from behind, controlling her by
16 twisting her left arm up and behind her back with his right hand and then stabbing her in the
17 upper left torso region using a knife held in his left hand.
18

19 The attack on Ms. Pacaccio shares many key characteristics with the attacks on Ms.
20 Ashley Ellerin, Mrs. Maria Bruno, and Ms. Michelle Murphy. The victim was attacked under
21 cover of darkness, at the victim's home, and with a knife. The victim was a petite, attractive,
22 and outgoing young woman.
23

24 Gargiulo lived within short walking distance of the victim's home. He was a peripheral
25 figure in Ms. Pacaccio's life, watching her from the margins. Gargiulo was friends with her
26 younger brother, Doug Pacaccio, and Gargiulo would see the victim from time to time when
27 visiting the Pacaccio family home.
28

1 The attack on Ms. Pacaccio was similar to the later attacks on Mrs. Maria Bruno and Ms.
2 Michelle Murphy in one other critical respect, similar in a way that would not be known for
3 another decade when evidence collected at the scene of her murder was re-examined using new
4 forensic tests: **Gargiulo left his DNA at the scene of the crime.** The Cook County Sheriff's
5 Department ("CCSD") did not learn until 2003 that the DNA they had collected from Ms.
6 Pacaccio's fingernails in August 1993 was that of Michael Gargiulo. In the meantime, Gargiulo
7 moved from Chicago to the Los Angeles area and took up residence within a short walk from his
8 second victim, Ashley Ellerin.

9

10 B. **The 2001 Ashley Ellerin Murder**

11 Ashley Ellerin (hereafter "Ms. Ellerin") was brutally stabbed to death inside her
12 residence on February 21, 2001 (Counts 5 and 6). Until her murder, Ms. Ellerin led a glamorous
13 life as a beautiful, twenty-two year old fashion student. She socialized with a young
14 "Hollywood" crowd, used drugs recreationally, and was dating a well-known actor, Ashton
15 Kutcher. The lovely and social Ms. Ellerin attracted Gargiulo's attention. He lived within short
16 walking distance of her apartment and during the months leading up to her murder he injected
17 himself into Ms. Ellerin's life. Gargiulo would show up at Ms. Ellerin's apartment unannounced
18 and uninvited. Witnesses saw Gargiulo staring into Ms. Ellerin's apartment at odd hours,
19 surveilling her home. Gargiulo's actions were so disturbing that Ms. Ellerin's roommate, Justin
20 Peterson, concluded that Gargiulo was a "stalker."

21 On one occasion, Gargiulo appeared at the apartment unannounced looking for Ms.
22 Ellerin. Mr. Peterson answered the door and told Gargiulo that she was not at home. During the
23 ensuing conversation, Gargiulo told Mr. Peterson "the FBI is after me for a murder they say I
24 committed in Chicago." Gargiulo had moved from Chicago to California about four years
25
26
27
28

earlier, around 1997. During their conversation, Gargiulo showed Mr. Peterson a knife he had
concealed in a sheath on his ankle.

Gargiulo believed he had a special relationship with Ms. Ellerin. But while Ms. Ellerin was flirtatious with other men, she did not pay particular attention to Gargiulo. On the night of her murder, Ms. Ellerin's landlord visited her apartment and the two shared an intimate encounter. Later that night, after the landlord left, Gargiulo entered Ms. Ellerin's home and viciously stabbed her over forty-seven times. Gargiulo slashed Ms. Ellerin's throat so violently during the attack that he nearly decapitated her. While that case was under investigation, Gargiulo moved from the Hollywood area to the El Monte area of Los Angeles County, in the same apartment complex as his next victim, Maria Bruno.

C. The 2005 Maria Bruno Murder

The third victim, Maria Bruno (hereafter "Mrs. Bruno"), age thirty-two, was attacked and brutally stabbed to death as she slept in her El Monte apartment on December 1, 2005 (Counts 3 and 4). Like the attacks on Ms. Ellerin, Ms. Pacaccio, and Ms. Murphy, the attack on Mrs. Bruno was especially violent. Gargiulo quite literally butchered her – stabbing her multiple times, slitting her throat, slicing off her breasts, and staging them for family members and police investigators to find.

Gargiulo's attack on Ms. Bruno mirrors his attack on the other victims. Again, Gargiulo lived near the victim – this time in the very same apartment complex and within eye and earshot of Mrs. Bruno's apartment. Again, his attention was drawn to the victim—a petite, attractive, outgoing, young woman. Again, he attempted to inject himself into the victim's life. Again, Gargiulo surveilled the victim at her home; witnesses saw a person matching his description staring at the victim's apartment in the days leading up to her murder, watching her as she moved

1 around inside. Only a few days before Mrs. Bruno's murder, a man matching Gargiulo's
2 description trailed Mrs. Bruno into her apartment uninvited. Realizing an intruder had followed
3 her into her apartment, Mrs. Bruno turned and ordered him to leave.

4 Again, the victim – while flirtatious and free with other men – did not pay particular
5 attention to Gargiulo. On the night of her murder, Mrs. Bruno returned to her apartment with
6 her husband, from whom she had been estranged. The two had been out drinking and patching
7 things up and they shared an intimate encounter in Mrs. Bruno's apartment. Later that night,
8 shortly after her husband left, Gargiulo entered Mrs. Bruno's apartment and brutally stabbed her
9 to death. **Again, Gargiulo left his DNA at the scene of the crime.** While that case was under
10 investigation, Gargiulo moved to the Santa Monica area of Los Angeles County, right near his
11 next victim, Michelle Murphy.

14 **D. The 2008 Michelle Murphy Attempted Murder**

15 Gargiulo, wielding a knife, viciously attacked his fourth victim, twenty-seven year old
16 Michelle Murphy (hereafter “Ms. Murphy”), as she slept in her Santa Monica apartment on April
17 29, 2008 (Counts 1 and 2). Gargiulo’s attack on Ms. Murphy was a repeat of his attacks on Ms.
18 Ellerin, Mrs. Bruno, and Ms. Pacaccio. Again, Gargiulo lived near the victim – this time, in the
19 apartment directly across a shared alley, where he was able to see into Ms. Murphy’s apartment.
20 Again, his attention was drawn to the victim—a petite, attractive, outgoing, young woman.
21 Earlier in the evening on the day of the attack, Ms. Murphy had been jump-roping in the alleyway
22 her apartment shared with Gargiulo’s, wearing a tight-fitting spandex exercise outfit. Again, he
23 injected himself into the victim’s life. In the months leading up to the attack, Gargiulo would
24 greet Ms. Murphy outside her apartment, even though they did not know one another. Again,
25 the victim did not pay particular attention to Gargiulo, but was flirtatious and free with her new
26
27
28

boyfriend. In the weeks before the attack, Ms. Murphy's new boyfriend frequently visited her
apartment. Again, Gargiulo attacked the victim inside her own home, in her bed, and under
cover of darkness, with a knife. In fact, the only difference from the attacks on Ms. Ellerin, Mrs.
Bruno, and Ms. Pacaccio is that Ms. Murphy was fortunate enough to wake up as Gargiulo
attacked her. Ms. Murphy fought with Gargiulo, who was stabbing her viciously all over her
arms and chest. Ms. Murphy was able to get her legs in a position to kick Gargiulo, causing him
to cut his own wrist with the knife and then flee. In doing so, Gargiulo left his blood inside of
the apartment, on Ms. Murphy's bedspread, and in the alley separating Ms. Murphy's home and
Gargiulo's home. **Again, leaving his DNA at the crime scene.** When investigators asked Ms.
Murphy about any strange men in her area, she mentioned Gargiulo. The DNA from the crime
scene was loaded into the Combined DNA Index System (CODIS), and a match came back on
Gargiulo. Investigators eventually obtained a sample of Gargiulo's DNA and matched it to the
DNA he had left behind in Ms. Murphy's apartment. Gargiulo was then arrested and charged
accordingly.

III.

IN DECIDING THE SUFFICIENCY OF THE EVIDENCE UNDER PENAL CODE SECTION 995, THE TRIAL COURT ACTS ONLY AS A REVIEWING COURT, NOT AS A TRIER OF FACT

The defendant asks this court to set aside the information under Penal Code section 995
based on the contention that the evidence at the preliminary hearing was insufficient to support the
magistrate's order binding defendant over for trial. However, the power of the trial court in
evaluating the sufficiency of the evidence under section 995 is limited.

The Supreme Court long ago stated in *Perry v. Superior Court* (1962) 57 Cal.2d 276, at
pages 283-284:

Although the magistrate, in reaching his decision, may weigh the evidence, resolve

1 conflicts, and give or withhold credence to witnesses, such a balancing of the
2 evidence is not within the powers of a tribunal reviewing the magistrate's order.
3 [Citation.] Thus, [any] contention concerning ... insufficiency of the evidence ...
must be discussed in light of the aforesaid doctrines restricting the scope of review
of a decision by a magistrate to hold a defendant to answer.

4 This limitation of section 995 review was re-affirmed in *People v. Hall* (1977) 3 Cal.3d 992,

5 996. Moreover:

6 The superior court in ruling on a motion under Penal Code section 995 may not
7 substitute its judgment for that of the magistrate as to the weight of the evidence
and every legitimate inference must be drawn in favor of upholding the information.
8 *The relationship of the superior court to the magistrate in such a situation is*
comparable to that of a reviewing court and a trial court. The fact-finding power
9 including that of determining the credibility of witnesses rests with the magistrate.

10
11 (*People v. Lopez* (1975) 52 Cal.App.3d 263, 266, italics added; accord, *People v. Hall, supra*, 3
12 Cal.3d at p. 996; *People v. Weaver* (1983) 143 Cal.App.3d 926, 930-931). Defendant in effect asks
13 this court to extend the scope of its power under section 995 and to re-weigh the evidence, determine
14 for itself the credibility of witnesses, or draw inferences from the evidence presented to the
15 magistrate. As persuasive as the argument might seem that this court should act like a trial court,
16 such an argument is inappropriate outside the context of a trial. As the Supreme Court noted in
17 *People v. Hall, supra*, 3 Cal.3d at page 996, citing *People v. Jablon* (1957) 153 Cal.App.2d 456,
18 459:
19

20
21 "On a motion to set aside an information, the question of the guilt or innocence of
the defendant is not before the court, nor does the issue concern the quantum of
22 evidence necessary to sustain a judgment of conviction. The court is only to
determine whether the magistrate, acting as a man of ordinary caution or prudence,
23 could conscientiously entertain a reasonable suspicion that a public offense had been
committed in which the defendant had participated."

24
25 This rule remains the same even if inferences drawn by the magistrate to hold the defendant
26 to answer were not more reasonable than the contrary inferences which the magistrate did not accept,
27 for the magistrate's conclusions must be respected. Thus, in *Ortega v. Superior Court* (1982) 135
28 Cal.App.3d 244, when a co-defendant (Morales) argued an alternative inference from the evidence

1 and contended that there was no reasonable cause to hold him to answer on the robbery charge
2 because no evidence showed that an intent to steal motivated the attack on the victim, the court
3 rejected his contention, reasoning as follows:

4 *We are not at liberty to select from available inferences.* The evidence
5 permits two inferences about Morales' intent. He may have formed an intent to
6 take Terri's purse before the attack or he may have been oblivious to the purse
7 until he returned to the car after the attack was completed. No item of evidence
8 lends differential weight to either inference. If the same evidence is presented at
9 trial the jury could not find Morales guilty of robbery. However, as related above,
10 the evidence to support an information need not be sufficient to support a
11 conviction. *It is possible to infer that Morales was aware Terri was carrying a*
purse and to infer he resolved to take it from her before the attack. We are
required to accept that inference in reviewing the sufficiency of the information. It
provides reasonable and probable cause to support a charge of robbery. [Fn.
omitted.]

12 (*Id.* at p. 257, italics added; accord, *People v. Superior Court (Bolden)* (1989) 209 Cal.App.3d 1109,
13 1113).

14 **IV.**

15 **THE INFORMATION WILL NOT BE SET ASIDE IF**
16 **SOME RATIONAL GROUND EXISTS FOR BELIEVING**
17 **THAT THE OFFENSE WAS COMMITTED BY THE**
ACCUSED

18 Penal Code section 872 provides in relevant part that if "it appears from the [preliminary]
19 examination that a public offense has been committed, and there is sufficient cause to believe that
20 the defendant is guilty, the magistrate shall make or indorse on the complaint an order" holding the
21 defendant to answer for the offense. (Pen. Code, § 872).
22

23 **A. To Withstand A Penal Code Section 995 Challenge, The Evidence Need**
24 **Only Establish Some Rational Ground To Believe A Public Offense Has**
25 **Been Committed And That Defendant Is Guilty**

26 The purpose of a motion under Penal Code section 995 is to review the sufficiency of the
27 pleading based on the evidence before the magistrate at the preliminary hearing. (*Merrill v.*
28 *Superior Court* (1994) 27 Cal.App.4th 1586). The proceeding determines whether the factual

1 showing at the preliminary hearing is sufficient to establish reasonable or probable cause to
2 believe that a criminal act occurred and that the defendant is guilty of such act. (*People v.*
3 *DeJesus* (1995) 38 Cal.App.4th 1, 14).

4 “The term ‘sufficient cause’ is generally equivalent to ‘reasonable and probable cause,’ that
5 is, such a state of facts as would lead a man of ordinary caution or prudence to believe and
6 conscientiously entertain a strong suspicion of the guilt of the accused.” (*People v. Uhlemann* (1973)
7 9 Cal.3d 662, 667; accord, *People v. Hurtado* (2002) 28 Cal.4th 1179, 1188-1189 [applied to
8 sexually violent predator proceedings]).

9 Recognizing the well settled principle that evidence justifying a prosecution need not be
10 sufficient to support a conviction, California courts have repeatedly held that “An information
11 will not be set aside or a prosecution thereon prohibited if there is some rational ground for
12 assuming the possibility that an offense has been committed and the accused is guilty of it.”
13 (*Caughlin v. Superior Court* (1971) 4 Cal.3d 461, 464; accord, *People v. Uhlemann*, *supra*, 9 Cal.3d
14 at p. 667, *People v. Slaughter* (1984) 35 Cal.3d 629, 637; *Cummiskey v. Superior Court* (1992) 3
15 Cal.4th 1018, 1027; *People v. Fine* (1997) 52 Cal.App.4th 1258, 1262, citing *Rideout v. Superior*
16 Court (1967) 67 Cal.2d 471, 474 (*Rideout*)²).

17 Moreover, where there is some evidence to support the magistrate’s decision, the reviewing
18 court may not inquire into its sufficiency. (*People v. Block* (1971) 6 Cal.3d 239, 245; *Salazar v.*
19 *Superior Court* (2000) 83 Cal.App.4th 840, 842; *People v. Mitten* (1974) 37 Cal.App.3d 879, 881-
20 882; *Frazzini v. Superior Court* (1970) 7 Cal.App.3d 1005, 1015). “[A]n indictment or information

26 ² In *Rideout*, *supra*, 67 Cal.2d 471, a Tareyton cigarette package containing marijuana cigarettes was found in the well
27 behind the back seat of a convertible, where the top folds down. Defendants Rideout and Perry were seated in the back
28 of the car; Oliver was driving, and the vehicle belonged to Oliver’s father. A “crutch” was found on the floor in the back
of the car. The Supreme Court held this evidence sufficient to require Rideout and Perry to stand trial for possession of
marijuana based on reasonable inferences from the proximity of the marijuana, its secretion in a cigarette package, and
the presence of the “crutch.” (*Id.* at p. 475).

1 should be set aside only when there is a total absence of evidence to support a necessary element of
2 the offense charged.” (§ 995; *People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1226;
3 accord, *Salazar v. Superior Court*, *supra*, 83 Cal.App.4th at p. 842; *People v. Chapple* (2006) 138
4 Cal.App.4th 540, 545-546).

5 ***B. The Reviewing Court Must Draw Every Legitimate Inference From***
6 ***The Evidence In Favor Of The Information***

7 A superior court reviewing a magistrate's order pursuant to a section 995 motion does not
8 have the power to judge the credibility of witnesses or resolve conflicts in the evidence. (*People*
9 *v. Laiwa* (1983) 34 Cal.3d 711, 718). Neither may it substitute its judgment as to the weight of
10 the evidence for that of the committing magistrate. (*Ibid.*; *People v. Eid* (1994) 31 Cal.App.4th
11 114, 125).

13 “Every legitimate inference that may be drawn from the evidence must be drawn in favor
14 of the information.” (*Rideout, supra*, 67 Cal.2d at p. 474; see also *People v. Daily* (1996) 49
15 Cal.App.4th 543, 549). If the record demonstrates some showing of every element of the charge,
16 the reviewing court must affirm the magistrate's ruling and deny the motion to set the charge
17 aside. (See *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1748 and *People v. Alonzo* (1993) 13
18 Cal.App.4th 535, 538).

20 While some showing must be made as to the existence of each element of the charged
21 crime, such showing may be made with circumstantial evidence supporting reasonable
22 inferences by the magistrate. (*People v. Superior Court (Jurado)*, *supra*, 4 Cal.App.4th at p.
23 1226, citing *Williams v. Superior Court* (1969) 71 Cal.2d 1144, 1148). Moreover, a reviewing
24 court should also presume “that the magistrate impliedly found every fact necessary to support
25 its ruling to be true.” (*People v. McCoy* (1974) 40 Cal.App.3d 854, 861.
26
27
28

V.

**THE PRELIMINARY HEARING MAGISTRATE PROPERLY ADMITTED
AND CONSIDERED STATEMENTS DEFENDANT GARGIULO MADE TO
UNDERCOVER LASD DEPUTIES DANA DUNCAN AND MICHAEL STALEY
DURING A COURT ORDERED "PERKINS" OPERATION**

"[T]he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good."

-United States Supreme Court
McNeil v. Wisconsin (1991) 501 U.S. 171

A. Introduction

The defense argues that Gargiulo's statements to undercover deputies during a court-ordered "Perkins Operation" conducted at the El Monte Police Department Jail should have been excluded and not considered by the preliminary hearing magistrate because they were obtained from Gargiulo involuntarily and in violation of his Due Process, Fifth and Sixth Amendment rights.

To the contrary, the detectives in this case conducted a lawful and professional audio recorded undercover operation authorized by a court order, and there was no Constitutional violation whatsoever that would require the exclusion of Gargiulo's statements, based upon three lines of reasoning:

First, the United States Supreme Court (*Illinois v. Perkins* (1990) 496 U.S. 292 (*Perkins*)) and the California Supreme Court (*People v. Williams* (1988) 44 Cal.3d 1127) have held repeatedly that operations of this kind and conversations between a defendant and an undercover officer posing as a cellmate do not require *Miranda* warnings because those conversations do not constitute “interrogation” and thus do not violate a defendant’s Fifth Amendment privilege against self-incrimination. So there was no *Miranda* violation in this case.

Second, the Sixth Amendment right to counsel is offense specific and does not attach until judicial proceedings have been initiated. At the time of the Perkin's Operation, the

1 defendant was only charged and represented by counsel in Counts One and Two in connection
2 with the attempted murder of Michelle Murphy, and the defendant did indeed make statements
3 to the undercover deputies regarding that attack. However, those statements were not admitted
4 at the preliminary hearing nor did the magistrate consider any of those statements in connection
5 with his evaluation of the evidence. Hence, by definition, there was no Sixth Amendment or
6 “*Massiah*” violation either with regard to the admitted evidence because the defendant’s Sixth
7 Amendment right had not yet “attached” to the uncharged Pacaccio, Bruno, and Ellerin murders,
8 and the escape attempt that occurred during the Perkin’s Operation itself.

9
10 Third, Gargiulo’s statements were given completely voluntarily and in keeping with his
11 Due Process rights. The detectives in this case deployed a lawful undercover operation pursuant
12 to a court order that involved no physical violence or brutality, no psychological coercion, no
13 threats or promises, or anything else that would have overborne the defendant’s will.

14
15 In fact, the defendant rambled for hours in a colloquy of self-serving statements, he slept
16 during several periods during the operation, ate, drank, spoke with his lawyer on the telephone,
17 was provided medication, conversed with jail personnel, used the toilet and sink, looked out the
18 window, and was otherwise comfortable enough in the jail cell and with the undercover deputies
19 to confided in them, whisper to them, and in the end tried to enlist them in his escape attempt.

20
21 In sum, the magistrate properly considered the statements that Gargiulo made during the
22 Perkin’s Operation, which was in compliance with the defendant’s Fifth, Sixth, and Due Process
23 rights.
24
25
26
27
28

1 **B. The Undercover Operation³**

2 In June 2008, Los Angeles County Sheriff's Department detectives, led by homicide
3 detective Mark Lillienfeld, organized an undercover operation to investigate Gargiulo's
4 involvement in the murders of Tricia Pacaccio, Maria Bruno, and Ashley Ellerin.

5 When the operation commenced, Gargiulo was in custody and charged only with the
6 attempted murder of Michelle Murphy. At the time, Gargiulo was represented by counsel and
7 had been arraigned on the Michelle Murphy charge.

8 On June 17, 2008, Gargiulo was transferred from the Los Angeles County Men's Central
9 Jail in downtown Los Angeles to the El Monte Police Department City Jail (about a 20 minute
10 drive), pursuant to a court order, and was placed in a holding cell with undercover LASD
11 Sheriff's Deputies Dana Duncan and Michael Staley.

12 During the operation Gargiulo was removed periodically from the cell and questioned by
13 various detectives from the Los Angeles County Sheriff's Department, Los Angeles Police
14 Department, Santa Monica Police Department, and Downey Police Department, all in order to
15 "stimulate" him. The general idea was for the homicide detectives to ask Gargiulo enough
16 information about the cases being investigated so he would be in a position to talk about those
17 crimes and to give the undercover deputies something to talk about with Gargiulo. During the
18 conversations with the homicide detectives in an interview room adjacent to the jail cell,
19 Gargiulo invoked his right to counsel and did not make any incriminating statements to them.
20
21
22
23
24
25

26

³ The undercover operation was audio recorded. That recording and the transcription are attached to the People's
27 motion *in limine* to introduce evidence at trial the defendant's statements made during the operation. The People
28 have no objection to the court reviewing that transcript and recording in ruling on this Penal Code section 995
motion, and offer herein to stipulate to the foundation, authenticity, and accuracy of the recording and the
transcript, for all purposes.

1 Nonetheless, over the next two days, Gargiulo conversed casually with the undercover
2 deputies with whom he believed at all times were fellow inmates. The undercover deputies
3 commiserated with Gargiulo and suggested strategies that he might adopt to fight the murder
4 charges. Eventually, Gargiulo made a number of incriminating statements, including revealing
5 his plan to escape. His plan involved killing the guard and stealing a police car to facilitate the
6 escape. He also fashioned two makeshift handcuff keys (also known in jail parlance as “shims”)
7 he concealed in his waistband. The operation was terminated when the undercover deputies
8 determined that Gargiulo’s risk of attempting to escape was high, and his planned attack on the
9 female jailer was imminent.

10 C. Summary of the Preliminary Hearing Testimony re The Perkin’s Operation

11 Undercover LASD Detective Michael Staley testified, in sum, as follows:

- 12 • Staley is a detective for the LASD assigned to the Sheriff’s Major Crimes Metro
13 Unit. He has been a deputy for almost 25 years. (PHT p. 1099)
- 14 • On June 17, 2008, Detective Staley was placed in a cell with Gargiulo. (PHT p.
15 1099, 1115)
- 16 • In the cell Gargiulo talked about the victim in El Monte and that he knew the
17 victim because he lived in the area. (PHT p. 1100)
- 18 • Gargiulo said that he looked in her window once to see if she was home. He said
19 he knocked on her door and when there was no answer he looked in the window.
20 (PHT p. 1100-01)
- 21 • Gargiulo was removed and interviewed by the LAPD. (PHT p. 1101)
- 22 • Detective Staley was aware with the order that Gargiulo was being removed to
23 speak with different agencies. After Gargiulo was removed by LAPD, Detective
24 Staley was placed in the cell with Gargiulo. (PHT p. 1101)
- 25 • Gargiulo said that he knew the LAPD victim and that he met her and her boyfriend
26 in a park. He mentioned something about a dog and vehicle trouble and that he
27 had helped them fix it and that he had become acquaintances with them. Gargiulo
28 said that his relationship was friendlier with the boyfriend and hung out with him
 more than the girl. (PHT p. 1102)

- 1
- 2 • Gargiulo said he had done air conditioning work. (PHT p. 1102) Gargiulo said he
3 checked the LAPD victim and her boyfriend's air conditioning unit for them one
4 time. (PHT p. 1103)
 - 5
 - 6 • Regarding the LAPD crime scene Gargiulo described the grounds and how you
7 pull in the driveway, get out, and go to the door. Gargiulo basically explained a
8 general description of the house. He also described the house as very dark and
9 that if you were to see somebody there that you would not be able to make
10 anything out due to lack of lighting. (PHT p. 1103-04)
 - 11
 - 12 • Gargiulo spoke in generalities about the patterns of serial killers. Gargiulo said
13 that one of the victims was blonde and one was a brunette and if it was a serial
14 killer then they should probably both be the same hair color. (PHT p. 1104)
 - 15
 - 16 • Gargiulo talked about escaping and he initially was trying to recruit Detective
17 Staley and his partner's assistance in escaping. Detective Staley and his partner
18 backed off that idea and Gargiulo began formulating a plan. (PHT p. 1104-05)
19 Gargiulo's plan was to make an attempt to escape from an interview room that
20 was across the parking lot of the El Monte Police Station. Gargiulo was taken to
21 this interview room several times by different investigators. He talked about being
22 locked in, left alone sitting in a chair, climbing up the ceiling, running down
23 another part of the building, coming down and popping out a window and running
24 over a fence. (PHT p. 1105)
 - 25
 - 26 • Gargiulo had been working on making two plastic handcuff shims from a plastic
27 spoon. A handcuff shim is a device used to unlock handcuffs. Gargiulo kept the
28 plastic handcuff shim he was working on in the waistband of his pants. It took
 him fifteen minutes to get it through a tiny hole in the waistband of his pants. He
 worked on making the handcuff shim from a plastic spoon by biting down on it
 with his teeth and thinning out with pressure from his teeth. (PHT p. 1105-07,
 1132-32)
 - 29
 - 30 • Gargiulo asked Detective Staley if the police could shoot him if he ran and
31 Detective Staley told him yes even if he did not have a weapon. (PHT p. 1108)
 - 32
 - 33 • Gargiulo said he was going to escape their jail cell by disabling the jailer with a
34 throat punch/knockout punch. He referred to the throat punch as a fatal punch.
35 (PHT p. 1108)
 - 36 • Most of the time Gargiulo was standing near the cell door. He did that so if the
37 jailer were to open the door he would be able to get in a throat punch. (PHT p.
38 1108-09)
 - 39
 - 40 • When the jailer came to the door he told Gargiulo to get on his bunk. (PHT p.
41 1109)

- 1 • The conversations took place in the El Monte Jail over a period of 42 hours. (PHT
2 p. 1110)
- 3 • Prior to being in the El Monte Jail, Gargiulo was in the Men's Central Jail. (PHT
4 p.1110)
- 5 • Detective Dana Duncan was also in the El Monte jail cell with Detective Staley.
6 (PHT p. 1114)
- 7 • Detective Mark Lillienfeld organized this event. (PHT p. 1114)
- 8 • Gargiulo was not handcuffed in the cell they were in. (PHT p. 1121)
- 9 • Gargiulo asked Detective Staley's partner to step up on his shoulders and look
10 out the window and asked Detective Staley's partner to look out the window to
11 get a visual of what the parking lot looked like and where the street was, where
12 the other building was and how many police officer and radio cars were in the
13 parking lot. (PHT p. 1122)
- 14 • Detective Staley's partner is about 6'2" and 170 pounds. The cell window was
15 about seven feet up. (PHT p. 1122)
- 16 • The LASD interviewed Gargiulo first, then LAPD, and then Downey PD. (PHT
17 p. 1124)
- 18 • Detective Staley never identified himself as a peace officer to Gargiulo. (PHT p.
19 1125)
- 20 • Detective Staley left the cell first, and then his partner left and then Gargiulo was
21 alone. This was a tactical decision because Gargiulo was about to make a physical
22 attack on the next jailer that opened the door and they thought it best that
23 Detective Staley and his partner come out in case Gargiulo would not cuff up and
24 come out. (PHT p. 1126)
- 25 • Gargiulo's handcuff shim was confiscated. (PHT p. 1126)
- 26 • Questioning about the incident in Santa Monica is not being offered for evidence
27 because he was represented and had already been arraigned. (PHT p. 1129-30)
- 28 • Detective Staley, his partner and Gargiulo first discussed how they ended up in
 the cell. Gargiulo said he was being framed for a stabbing or something in Santa
 Monica and he did not go into any details. When Gargiulo was talking about
 certain incidents he would jump around and Detective Staley would have to
 clarify which case he was talking about. (PHT p. 1130)

1 ***Undercover LASD Detective Dana Duncan Testified, in sum, as Follows:***

- 2
- 3 • Detective Duncan is a Deputy Sheriff who is currently assigned to Major Crimes
Bureau Metro Detail. Detective Duncan has been a sworn peace officer for 27
and a half years. (PHT p. 1186)
 - 4
 - 5 • On June 17, 2008, Detective Duncan was placed in a cell in the El Monte Jail
with Detective Mike Staley and Michael Gargiulo. (PHT p. 1186-87)
 - 6
 - 7 • Before entering the cell with Gargiulo, Detective Lillienfeld told Detective
Duncan the order that Gargiulo would be interviewed by the different police
agencies. (PHT p. 1187)
 - 8
 - 9 • The first agency to interview Gargiulo was the LASD, then the LAPD, and then
the Downey police. (PHT p. 1187-88)
 - 10
 - 11 • After Gargiulo was removed the first time, he returned to the cell and started
talking to Detective Duncan. (PHT p. 1188)
 - 12
 - 13 • Detective Lillienfeld told Detective Duncan that he was going to tell Gargiulo
that the victim was attractive and big chested. Detective Lillienfeld was going to
mention to Gargiulo that there was DNA found in conjunction with the Bruno
murder on a bootie found at the crime scene. (PHT p. 1188) Detective Lillienfeld
was also going to tell Gargiulo that there was an eyewitness that had seen
Gargiulo going into the victim's apartment. (PHT p. 1188-89)
 - 14
 - 15 • An older man who lived downstairs in the apartment complex had seen Gargiulo
enter the victim's apartment at one point. (PHT p. 1189)
 - 16
 - 17 • Detective Lillienfeld told Duncan that he was going to mention to Gargiulo that
a hat was recovered. (PHT p. 1189)
 - 18
 - 19 • After speaking with Detective Lillienfeld, Gargiulo mentioned that he knew the
victim in the El Monte murder and that he lived in the same apartment complex
across the courtyard from her. (PHT p. 1189-90) Gargiulo lived upstairs and the
victim lived downstairs. Gargiulo said that he knew the victim for about one week
and had been inside her apartment two or three times and had helped her carry
groceries and laundry. (PHT p. 1190) Gargiulo said that Maria Bruno told him
that she was separated from her husband and that her husband had taken their four
children from her. (PHT p. 1190)
 - 20
 - 21 • Gargiulo mentioned that when he worked as a heating and air conditioning man,
that he wore booties into people's homes to keep from muddying up the floors
and that he had a lot of these booties everywhere. He mentioned this information
as an explanation as to why a bootie was found at the crime scene in El Monte.
(PHT p. 1190-91)
 - 22
 - 23
 - 24
 - 25
 - 26
 - 27
 - 28

- 1
- 2 • Gargiulo explained that the murderer could have stood at the victim's front door,
3 looked up onto the balcony where his apartment is and seen the booties in front
4 of his door and ran upstairs, grabbed the booties, put them on, came back
downstairs and broke into the victim's apartment. (PHT p. 1191) He also said that
there could have been booties in the apartment and he could have broken in, seen
the booties, put them on and killed the victim. (PHT p. 1191)

5

 - 6 • Gargiulo's explanation as to why detectives found his DNA on the bootie was
7 because he had been in the victim's house two or three times and so his DNA
would be inside the apartment. (PHT p. 1192)

8

 - 9 • Gargiulo discussed different scenarios regarding the bootie as to how a bootie
could be found at the crime scene with his DNA and the victim's DNA. (PHT p.
1192)

10

 - 11 • Gargiulo also said that at one point or another that he had given a pair of booties
to this girl because she asked him for them. (PHT p. 1193)

12

 - 13 • Gargiulo said that he knew the elderly witness downstairs, that he talked to him
many times, and that he would say hi to him and discuss thing with him

14

 - 15 • Gargiulo said that the man did see him go into the apartment and that the man
also saw Gargiulo knock at the door and look in the window. (PHT p. 1193)

16

 - 17 • Gargiulo said that he was worried about the hat because he used to wear a Boston
Red Sox hat but that the hat was not his because he had thrown his away. (PHT
p. 1193-94)

18

 - 19 • As a follow-up question to the fact that Gargiulo threw away his hat, he asked if
detectives search the dumps and Duncan told him yes they do. (PHT p. 1194-95)

20

 - 21 • Detective Duncan's conversation with Gargiulo went on for over 42 hours. (PHT
p. 1195)

22

 - 23 • Detective Duncan and Detective Staley would take turns leaving and coming back
to the cell. (PHT p. 1195)

24

 - 25 • Gargiulo spoke freely with Detective Duncan but Gargiulo would lower his voice
at times because he believed that the cell was bugged. (PHT p. 1196)

26

 - 27 • When he lowered his voice Gargiulo told Detective Duncan that Detectives had
told him that there was an identification of him and then he asked what was the
likelihood that the same person coming out of seven (he quickly changed it to

28

1 five) different crime scenes would be identified if the person was wearing a mask.
2 (PHT p. 1196)

- 3
- 4 • Gargiulo mentioned that you cannot tell the angle of the knife wounds. (PHT p.
5 1196-97) Gargiulo mentioned that the Detectives believed that the killer in the El
6 Monte case was left-handed and Gargiulo wanted to show Detective Duncan that
7 was impossible. Gargiulo made Detective Duncan stand up off his bunk and he
8 moved Detective Duncan underneath the video camera and then flushed the toilet
9 to drown out the audio. (PHT p. 1197) Then Gargiulo stood behind Detective
10 Duncan with his hand on his shoulder and began to show Detective Duncan in a
11 downward and upward motion with his right hand and then his left hand that it
12 would leave essentially the same marks in a body. (PHT p. 1197)
 - 13 • Gargiulo did another knife reenactment. He got up and started walking from wall
14 to wall muttering something and as he slowly walked he would have one hand
15 out ahead of him and in crisp motions he would reach out as if he was grabbing
16 around the face of someone and pulling it to the side. And then with his other
17 hand he reached up holding something that Detective Duncan assumed was a
18 knife and began circular slicing motion around what would be the victim's neck
19 area. (PHT p. 1199)
 - 20 • Gargiulo talked about escaping and he tried to employ Detective Duncan and his
21 partner's help. (PHT p. 1199-1200)
 - 22 • Gargiulo asked them if they had anything metal so that he could unscrew the
23 screws on the window because it was a little hot in there. Gargiulo asked
24 Detective Duncan for the tab on the zipper of his Levis to use a screwdriver. (PHT
25 p. 1200)
 - 26 • Gargiulo also began looking for a metal object that he could tunnel out the back
27 wall because he felt it was old and that they might be able to escape. (PHT p.
28 1200)
 - 29 • Gargiulo told Detective Duncan to come over and stand on his shoulders so that
30 he could look out the high window on the back wall and see what was outside the
31 jail cell so that if they escaped they knew what terrain they were in for. (PHT p.
32 1200) Detective Duncan told Gargiulo that an escape would be tough because
33 there were police cars everywhere. (PHT p. 1201)
 - 34 • Gargiulo talked about jumping up in the false ceilings and getting out through the
35 ductwork. (PHT p. 1201)
 - 36 • Then Gargiulo talked about attacking a jailer. She was an older female jailer and
37 he told Detective Duncan and his partner that they could take her easy. Gargiulo
38 said the plan was to jump her, give her a knockout punch. Gargiulo talked about
39 knowing what button to push that would allow them outside. Gargiulo asked
40 Detective Duncan and his partner if they knew where they keep the keys to the

1 police cars. He said it would be great if they got a police car but that if not they
2 could carjack someone and then go to Mexico and ultimately live down there.
(PHT p. 1201)

- 3 • Detective Duncan and his partner made it clear that they would not help Gargiulo
4 with his escape plan. Detective Duncan explained that he had a lightweight charge
5 and that if he punched a jailer that he might add to his charge. (PHT p. 1202)
- 6 • Gargiulo also talked about punching another jailer who was a larger guy and said
7 that he would be no problem because a knockout punch would entail punching
8 the jailer in the throat and that it would be fatal. Gargiulo said he would wait until
9 the jailer opened the door and then they would ambush him. (PHT p. 1202)
- 10 • Initially Gargiulo was very polite to the jailer but towards the end he would stand
11 to the side of the door, out of the jailers view like he was going to ambush him.
12 Detective Duncan warned the jailer of Gargiulo's plan and so the jailer insisted
13 that he show himself and ultimately made him sit on his bunk. (PHT p. 1204)
- 14 • The operation was terminated because Detective Duncan was worried that
15 someone may get hurt from Gargiulo's escape plan. (PHT p. 1205)
- 16 • Detective Duncan thought that Gargiulo was capable of hurting someone because
17 Gargiulo would brag about being able to do push-ups with his arms outstretched
18 on his fingertips and he showed Detective Duncan and his partner how limber he
19 was. Gargiulo always talked about working out and how he knew martial arts.
20 (PHT p. 1205)
- 21 • Gargiulo never attempted to break out of the cell door or the window. He mostly
22 just talked a lot about escaping. (PHT p. 1206)
- 23 • Detective Duncan saw Gargiulo making a handcuff shim. Gargiulo asked
24 Detective Duncan how to use the handcuff shim and Detective Duncan lied and
25 told him that you put it in the hole and turn it around to get yourself out. Gargiulo
26 had two of these handcuff shims in his possession. (PHT p. 1207-08)
- 27 • Detective Duncan never saw Gargiulo use the handcuff shim on a pair of
28 handcuffs. Gargiulo was not wearing handcuffs in the cell. (PHT p. 1208-09)

24 **D. There was no Fifth Amendment (Miranda) Violation**

25 The investigative technique used in this case to obtain Gargiulo's statements is
26 commonly known as a "Perkins Operation" and takes its name from the United States Supreme
27 Court case *Illinois v. Perkins* (1990) 496 U.S. 292 (*Perkins*), which was the beginning of a long
28

line of Supreme Court authority that specifically permits the type of operation conducted in this
case. The *Perkin's* case held, in unusually blunt and categorical language, that *Miranda has no*
application to conversations between undercover police agents and inmates.

To that end, the defense seems to concede that *Perkins* is controlling authority and there
was no *per se* *Miranda* violation in this case, but nonetheless the defense argues that the lack of
Miranda warnings is a factor to be considered under a totality of the circumstances in
determining whether or not a Due Process violation has occurred i.e. that Gargiulo's statements
were involuntary and otherwise elicited through "coercion." However, even if the defense is
claiming that a *Miranda* violation occurred, that argument must be rejected.

The United States Supreme Court has long held that "To protect the constitutional
privilege against self-incrimination, the *Miranda* rule requires that before the police may
question the defendant during a custodial interrogation, the defendant must be advised of the
right to remain silent and to an attorney and that any statements made may be used against him
or her in court. If the defendant invokes the right to silence or to an attorney, the interrogation
must cease. Generally, statements elicited in violation of these *Miranda* principles may not be
used against the defendant at trial This exclusionary rule is applied in prophylactic fashion
to deter coercive investigative questioning and advance the trustworthiness of trial evidence,
even if the defendant's statements were voluntary apart from the *Miranda* violation." (*People v.*
Andreasen (2013) 214 Cal.App.4th 70, 86 (*Andreasen*); *Edwards, supra*, 451 U.S. at pp. 482,
485).

However, "[t]he prophylactic *Miranda* protections are triggered only if a defendant is
subjected to a custodial interrogation." (*Andreasen*, at p. 86). "Interrogation Refers to
questioning initiated by the police or its functional equivalent, not voluntary conversation.

1 ‘Volunteered statements of any kind are not barred by the Fifth Amendment’ The ‘functional
2 equivalent’ to express questioning involves police-initiated deceptive techniques designed to
3 persuade or coerce a criminal defendant into making inculpatory statements. The determination
4 of whether an action is reasonably likely to elicit an incriminating response focuses primarily on
5 the perceptions of the suspect, rather than the intent of the police.” (*People v. Thornton* (2007)
6 41 Cal.4th 391, 432, citing *Rhode Island v. Innis* (1980) 446 U.S. 291, 299-301 (*Innis*) and
7 *Miranda, supra*, 384 U.S. at p. 478).

8
9 Since the focus of this analysis is on the perceptions of the defendant, courts have
10 concluded a defendant’s conversation with someone the defendant does not know is a
11 government agent is not custodial interrogation for purposes of *Miranda*. Thus, in *Perkins* the
12 Supreme Court concluded *Miranda* warnings were not required when the police placed the
13 defendant in a cell with an undercover agent who then elicited incriminating statements from the
14 defendant. The court explained: “The warning mandated by *Miranda* was meant to preserve the
15 privilege during ‘incommunicado interrogation of individuals in a police-dominated
16 atmosphere.’ [Citation.] Conversations between suspects and undercover agents do not
17 implicate the concerns underlying *Miranda*. The essential ingredients of a ‘police-dominated
18 atmosphere’ and compulsion are not present when an incarcerated person speaks freely to
19 someone whom he believes to be a fellow inmate. Coercion is determined from the perspective
20 of the suspect. When a suspect considers himself in the company of cellmates and not officers,
21 the coercive atmosphere is lacking.” (*Perkins*, at p. 296; *People v. Davis* (2005) 36 Cal.4th 510,
22 554 (*Davis*)).
23
24

25 *Perkins* is consistent with the conclusion of the California Supreme Court in *People v.*
26 *Williams* (1988) 44 Cal.3d 1127, that *Miranda* “has never been applied to conversations between
27
28

1 an inmate and an undercover agent. This is because *Miranda* warnings serve to dispel the
2 coercive effect of *police custodial* questioning. Both adjectives are crucial: *Miranda* does not
3 apply to noncustodial police interrogation or to non-police custodial interrogation. When a
4 defendant talks to a fellow inmate, the coercive atmosphere of custodial police interrogation is
5 absent.” (*Williams*, at pp. 1141-1142).

7 Since *Perkins*, the California Supreme Court and courts of appeal in this state have
8 repeatedly concluded that even after a defendant has invoked his right to remain silent or to have
9 the assistance of counsel, the defendant's subsequent statements to a person he does not know is
10 an explicit or unwitting government agent--e.g. a relative or friend cooperating with police, or a
11 fellow suspect who is knowingly or unknowingly being recorded by police--do not implicate
12 *Miranda* because such statements are not the product of “custodial interrogation.”
13

14 In *Davis*, after the defendant invoked his *Miranda* rights, police recorded a conversation
15 between the defendant and his cellmates in which he made incriminating statements. The
16 reviewing court explained that when the situation was viewed from the defendant's perspective,
17 when he made statements to his cellmates there was “no longer a coercive, police-dominated
18 atmosphere, and no official compulsion for him to speak.” (*Davis, supra*, 36 Cal.4th at pp. 553-
19 555). As a result, admission of the incriminating statements did not violate his rights under
20 *Miranda*. (See also *People v. Jefferson* (2008) 158 Cal.App.4th 830, 840-841 [after defendants
21 invoked their *Miranda* rights police placed them in a cell and recorded their conversation; no
22 *Miranda* violation because there was no interrogation]).
23

24 In *People v. Mayfield* (1997) 14 Cal.4th 668, 757-758, after the defendant invoked his
25 *Miranda* rights and requested an attorney, he asked to speak with his father. Police recorded the
26 conversation and also asked the father to repeat what the defendant had said. The reviewing court
27
28

concluded the statements the defendant made to the father were not the product of custodial interrogation. (See also *People v. Thornton*, *supra*, 41 Cal.4th at pages 432-433 [after the defendant invoked his *Miranda* rights, police arranged a conversation between the defendant and his grandmother; the defendant voluntarily engaged in conversation with her and police recorded the conversation with the grandmother's knowledge; reviewing court found the conversation was not interrogation or its functional equivalent, thus there was no Fifth Amendment violation]).

In *People v. Plyler* (1993) 18 Cal.App.4th 535, after the defendant asserted his right to counsel, police orchestrated a call by the defendant to one of his victims, with the victim's knowledge and cooperation. The appellate court concluded the defendant's recorded statements to the victim were not the product of police custodial interrogation. The court reasoned that even if the defendant had been coerced into placing the call, "he did not know [the victim] was working with the police. Under *Perkins*, absent such knowledge there is no reason to assume he might feel coerced and no Fifth Amendment violation occurred." (*Id.* at pp. 544-545, fn. omitted).

Similarly, in *People v. Guilmette* (1991) 1 Cal.App.4th 1534, 1538-1542, after the defendant invoked his *Miranda* rights, police recorded the defendant's telephone calls to the victim, with the victim's cooperation. During the calls the victim asked the defendant questions suggested by police; the defendant also volunteered statements and answered the victim's independent questions. The court found there was no *Miranda* violation because there was no custodial police interrogation. Although it was conceded that the victim was acting as a government agent, the court noted the defendant initiated the telephone contact, sought out the conversation, and was not forced to speak with the victim. The court explained: "Since appellant was not forced to contact the victim and since he did not know that [the victim] was acting as a

1 police agent, there was no ‘police-dominated atmosphere’, there were no ‘inherently compelling
2 pressures,’ and there was no ‘coercive atmosphere.’” (*Id.* at p. 1540). The court further rejected
3 the argument that the defendant’s prior invocation of his rights changed the analysis. In the
4 absence of custodial interrogation, the court reasoned, “the fact that the conversation occurred
5 after an invocation of rights is without legal significance.” (*Id.* at p. 1541). (See also *People v.*
6 *Gonzales and Solis* (2011) 52 Cal.4th 254, 272-273, 283-284 [no custodial interrogation where
7 fellow inmate and gang member wore a wire and discussed crimes with defendant; no *Miranda*
8 warnings were required]; *People v. Tate* (2010) 49 Cal.4th 635, 681, 685-687 [in the midst of a
9 custodial interrogation (after defendant waived *Miranda* rights), defendant’s girlfriend asked to
10 speak with him then reported to police what he said; police were not required to provide new
11 *Miranda* warnings before the conversation with the girlfriend; even in the process of a custodial
12 interrogation, a voluntary statement to someone the suspect does not believe is a police officer
13 or agent does not involve the coercive atmosphere of police questioning in custody]).
14

15 Here, as in *Perkins*, and as in cases such as *Davis*, defendant “‘consider[ed] himself in
16 the company of cellmates and not officers,’ and the coercive atmosphere of custodial
17 interrogation was lacking. Viewing the situation from defendant’s perspective (see *Arizona v.*
18 *Mauro, supra*, 481 U.S. at p. 527; *Rhode Island v. Innis, supra*, 446 U.S. at p. 301), when he
19 made these statements to his cellmates there was no longer a coercive, police-dominated
20 atmosphere, and no official compulsion for him to speak.” (*Davis, supra*, at p. 555).

21 Defendant seemingly attempts to distinguish or minimize *Perkins* by asserting the
22 detectives’ “stimulation” technique, combined with the undercover officers’ lengthy
23 conversation with defendant, created a police-dominated atmosphere not present in *Perkins* and
24 amounted to coercion. Whatever defendant’s motivation for conversing with the undercover
25

1 deputies was, there was no “official compulsion” for him to speak to them because he did not
2 believe they were police officers.

3 In sum, *Miranda* forbids coercion, not mere strategic deception by taking advantage of a
4 suspect’s misplaced trust in one he supposes to be a fellow prisoner. As long-recognized in
5 *Miranda*: “[C]onfessions remain a proper element in law enforcement. Any statement given
6 freely and voluntarily without any compelling influences is, of course, admissible in evidence.”
7 Plots to mislead a suspect or lull him into a false sense of security that do not rise to the level of
8 compulsion or coercion to speak are not within *Miranda*’s concerns.” (*Perkins*, at p. 297).

9 The undercover detectives in this case were persistent and effective questioners. But there
10 was no evidence they coerced defendant into speaking with them. Gargiulo had no reason to
11 believe they had any official power over him, nor did they threaten him in any way. With respect
12 to the presence or absence of “coercion” within the meaning of *Miranda*, there is no basis to
13 distinguish this case from *Perkins* and the preliminary hearing magistrate properly heard and
14 considered this evidence in holding Gargiulo to answer.

15 **E. There Was No Sixth Amendment Violation**

16 The defense argues that Gargiulo’s statements to the undercover deputies regarding
17 Ashley Ellerin, Maria Bruno, Tricia Pacaccio, and his attempted escape are inadmissible because
18 they were obtained in violation of Gargiulo’s Sixth Amendment right to counsel, and otherwise
19 should be used as a factor in considering whether or not Gargiulo’s statements were obtained
20 voluntarily within the meaning of the Due Process clause of the Fourteenth Amendment. That
21 argument ignores two essential characteristics of the Sixth Amendment right—that it does not
22 attach until the time that adversary judicial proceedings have been initiated, and that it is offense
23 specific.

1 It is well-settled, of course, that the Sixth Amendment provides that “[i]n all criminal
2 prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his
3 defense.” “The Sixth Amendment guarantees the accused, at least after the initiation of formal
4 charges, the right to rely on counsel as a ‘medium’ between him and the State.” *Maine v.*
5 *Moulton* (1985) 474 U.S. 159, 176. And indeed in certain circumstances, a defendant’s Sixth
6 Amendment right may require exclusion of statements obtained by undercover police officers
7 outside the presence of counsel. “In *Massiah v. United States* (1964) 377 U.S. 201, and its
8 progeny, the United States Supreme Court held that ‘the government’—whether federal or
9 state—‘may not use an undercover agent to circumvent the Sixth Amendment right to counsel
10 once’ that right has attached.” *People v. Clair* (1992) 2 Cal. 4th 629, 657 (citation omitted).
11
12

13 However, there are two important limitations to the exclusionary action of the Sixth
14 Amendment.
15

16 First, a defendant has no Sixth Amendment right to counsel until that right “attaches.”
17

18 “After attachment, the Sixth Amendment prevents the government
19 from interfering with the accused’s right to counsel. Before
attachment, by contrast, the constitutional provision is not
implicated.”

20 The Sixth Amendment right to counsel does not attach until a
21 prosecution is commenced, that is, at or after the initiation of
22 adversary judicial criminal proceedings—whether by way of
23 formal charge, preliminary hearing, indictment, information, or
arraignment. It is not enough, for example, that the defendant has
become the focus of the underlying criminal investigation.”

24 *Clair*, 2 Cal. 4th at 629 (quotations and citations omitted).
25

26 Second, the Sixth Amendment right is “offense specific.” “The Sixth Amendment right to
27 counsel, the United States Supreme Court has declared, is ‘offense specific.’ That is to say, it
28 attaches to offenses as to which adversary judicial criminal proceedings have been initiated—

1 and to such offenses alone.” *Clair*, 2 Cal. 4th at 657, citing *McNeil v. Wisconsin* (1991)
2 501 U.S. 171. At the time of the Perkins Operation, Gargiulo’s Sixth Amendment right to
3 counsel had only attached with respect to Counts 1 and 2 (the burglary and attempted murder of
4 Michelle Murphy). Gargiulo had not yet been charged with Counts 3 through 7, the murders of
5 Ashley Ellerin and Maria Bruno and the attempted escape charge. Hence, his Sixth Amendment
6 right with regard to those murders had not yet attached. Therefore, the Perkins Operation could
7 not have violated Gargiulo’s Sixth Amendment right with regard to Counts 3 through 7—a right
8 which had not yet come into being—and any statements made about those murders were
9 voluntary and properly considered by the preliminary hearing magistrate. Furthermore, since
10 the magistrate did not consider any statements made regarding the Michelle Murphy attack, that
11 issue is moot.

14 **F. Due Process Claims**

15 **1. Introduction**

16 The defense contends that Gargiulo’s Fourteenth Amendment right to Due Process was
17 violated during the Perkin’s Operation because, based on the totality of the circumstances,
18 Gargiulo’s statements were coerced *i.e.* obtained involuntarily. The defense argument, however,
19 is based upon a combination of factual and legal fallacies and must be rejected, for the following
20 reasons:

21 **2. The Law**

22 American courts have long considered the admission into evidence of a confession
23 obtained by police use of force to be a violation of Due Process, “a wrong so fundamental that it
24 made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence
25 wholly void.” *Brown v. State of Mississippi* (1936) 297 U.S. 278, 286. Involuntary confessions
26
27
28

1 are excluded because they offend the community's "sense of fair play and decency," and
2 "because exclusion serves to discourage the use of physical brutality and other undue pressures
3 in questioning those suspected of crime. *People v. Ditson* (1962) 57 Cal. 2d 415. Consequently,
4 a trial court's analysis of an alleged Due Process violation must focus on whether the suspect's
5 will was overborne by law enforcement conduct, without regard to whether the resulting
6 statement was true or false *Rogers v. Richmond* (1961) 365 U.S. 534, 540. The coercion itself
7 must also motivate the incriminating statement. *People v. Johnson* (70 Cal. 3d 469). The
8 prosecution bears the burden of proof, by preponderance of the evidence, as to the voluntariness
9 of a statement or absence of a *Miranda* violation. *Lego v. Twomey* (1972) 404 U.S. 477. Here,
10 however, the following indicia of a Due Process violation were *not* present in this case:
11
12

13 • **Actual or threatened violence**

14 There is no evidence whatsoever, in the "four corners" of the preliminary hearing transcript
15 or otherwise⁴, that force was used at all with the defendant or that he was threatened, harmed, or
16 brutalized in any way. In fact the opposite is true. The preliminary hearing evidence showed
17 that it was the defendant who was planning to attack a female guard in order to facilitate his
18 escape. The only threatening and intimidating and violent conduct in this case came from the
19 defendant himself, who was plotting to kill the jailer, which caused the undercover deputies to
20 terminate the operation in order to save the jailer's life.
21
22
23
24
25

26 ⁴ The court is usually limited in ruling on a Penal Code section 995 motion to the four corners of the transcript and
27 the evidence presented at the preliminary hearing, unless the defendant's claim of a Fifth and Sixth Amendment
28 and Due Process violation amount to a violation of a "substantial right", in which case the trial court may receive
evidence outside of the record of the preliminary hearing examination. See *People v. Coleman* (1988) 46 Cal. 3d
749. Here, the prosecution has no objection to the court examining the entire recording and transcript of the
Perkin's Operation, which has already been filed with the court in a separate motion.

- Psychological coercion

When a defendant alleges psychological coercion, courts engage in a “weighing of circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal.” *Stein v. People of State of New York* (1953) 346 U.S. 156, 185 (overruled in part by *Jackson v. Denno* (1964) 370 U.S. 156). The California Supreme Court has stated, “The court’s have prohibited only those psychological ploys which, under all of the circumstances, are so coercive that they tend to produce a statement that both involuntary and unreliable. *People v. Ray* (1996) 13 Cal. 4th 313, 340. The defendant in this case is a man of mature years and criminal sophistication, as demonstrated by his plot to escape from jail and his manufacturing of makeshift handcuff keys during the Perkin’s Operation. He planned that escape while in the presence of two undercover deputies whom he confided in and with whom he clearly had no fear. Moreover, most of the defendant’s statements themselves were mostly cryptic and self-serving in nature. It stands to reason that if he was subjected to psychological coercion, he would have confessed to the subject murders, yet he did not. Instead he exhort ed denials. The defendant was in control of the flow of information between him and the undercover deputies and the deputies were friendly, rather than harsh with the defendant. There is no evidence that psychological coercion, if any in the case, motivated any incriminating response by the defendant.

- Threats and/or Promises

There is no evidence that the undercover deputies promised the defendant any benefit or leniency in any way, or threatened him in any way.

1 • **Physical Setting**

2 The physical setting in this case by all accounts was a typical inmate cell at the El Monte Jail
3 and there was nothing inherently coercive about it. The defendant was free to move about the
4 cell and there were windows. Indeed, the defendant was free to the extent that he put one of the
5 undercover deputies on his shoulders to get a view out of the window while planning his escape
6 (PHT p. 1122). The length of the operation, which was less than 48 hours, was conducted under
7 circumstances where the defendant perceived the undercover deputies as fellow inmates and not
8 as law enforcement officers, he had access to food, water, a toilet, and a sink, and the
9 conversation between the undercover deputies and the defendant was at all times in the context
10 of them having a good rapport with each other. It was low intensity conversation and never
11 accusatory or aggressive. There were long breaks where no conversation was conducted at all,
12 and the defendant slept during various periods. For all intents and purposes, the Perkin's
13 Operation in this case was conducted in the defendant's temporary residence, which is a location
14 that does not normally present coercive elements, and has been held as such in an analogous
15 *Miranda* context. See *Beckwith v. U.S.* (1976) 425 U.S. 341.
16
17

18 • **Deception as a Police Tactic**

19 There is no coercion where police deception results in a suspect being unaware that a state
20 agent is seeking incriminating information. *Illinois v. Perkins* (1990) 496 U.S. 292
21
22

23 • **Exploiting the Suspect's Vulnerabilities**

24 There is no evidence at all that the defendant's vulnerabilities, if any, were exploited. There
25 is no evidence that the defendant had any physical distress, emotional distress, mental infirmity,
26 or religious issues that were exploited by the undercover detectives, or that he was under the
27 influence of any drugs or alcohol.
28

1 • **Deliberate Miranda Violations**

2 There was no *Miranda* violation in this case because *Miranda* is not triggered in undercover
3 operations like the one in this case where the defendant/suspect believes he is merely speaking
4 to fellow inmates and not law enforcement.

6 **3. Summary**

7 A confession may be found involuntary if causally linked to police threats or violence,
8 obtained by direct or implied promises, or secured by the exertion of improper influence. (*People*
9 *v. Linton* (2013) 56 Cal.4th 1146, 1176).

11 Here, Gargiulo made various, sometimes cryptic admissions to the undercover deputies
12 in response to their friendly questions, but there is no evidence whatsoever that those statements
13 were obtained by express or implied threats, promises of leniency, or any other coercive
14 behavior. (*Tate, supra*, 49 Cal.4th at p. 684 [use of deceptive statements during an interrogation
15 does not render confession involuntary unless the deception is of a type reasonably likely to
16 procure an untrue statement]).

18 Indeed, Gargiulo never believed or indicated in any way that he was speaking to
19 government agents, and he had no reason to believe the undercover deputies had any official
20 power over him. (*People v. Atchley* (1959) 53 Cal.2d 160, 171 [defendant's recorded statements
21 to insurance agent who was a former police officer, and was acting in concert with the police,
22 were voluntary]). Critically, it has long been held that, [t]he use of subterfuge by police
23 investigators is not necessarily impermissible because “*subterfuge per se is not the same as*
24 *coercive conduct*” (*People v. Dominick* (1986) 182 Cal. App. 3d 1174, 1192. (Emphasis added)).

27 Moreover, the record is void of any indication of physical mistreatment or threats.
28 During the operation Gargiulo was housed in a regular holding cell, with the court’s knowledge

1 and approval, which included a toilet, a window, food, water, a bunk, and access to jailers and a
2 telephone. The cell was of sufficient comfort to house the two undercover detectives over a two-
3 day period and, notably, security was at such a moderate and reasonable level that Gargiulo
4 actually believed that he could escape, and hatched a plan to do so. Gargiulo moved freely about
5 the cell, exercised by doing pushups on his fingertips, and demonstrated on one of the detectives
6 a throat slashing re-enactment (Ashley Ellerin and Maria Bruno were both murdered by vicious
7 slashing to the neck).

9 Furthermore, during the entire operation Gargiulo made numerous denials to the subject
10 murder accusations, which belies the suggestion that he was coerced in any way. It stands to
11 reason that if he was coerced, he would have confessed to anything, including murder, and he
12 did not do that.

14 In sum, there is no basis, and no support in the record at all, that Gargiulo's statements
15 were the result of his will being overborne by police coercion. (*People v. Dykes* (2009) 46 Cal.4th
16 731, 752; *People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1173-1174 [no coercion rendering
17 admissions involuntary where defendant thought he was talking to a friend and was unaware
18 fellow suspect was secretly recording at behest of the police]).

21 VI.

22 **THE EVIDENCE PRESENTED AT THE PRELIMINARY**
23 **HEARING WAS SUFFICIENT TO SUPPORT THE**
24 **ORDER HOLDING DEFENDANT GARGIULO TO**
ANSWER ON THE CHARGES OF MURDERING
ASHLEY ELLERIN AND MARIA BRUNO

25 The defense contention that the evidence presented at the preliminary hearing was
26 insufficient to establish a "strong suspicion" that the defendant murdered Ashley Ellerin and
27 Maria Bruno is without merit.
28

1 First and foremost, conspicuously absent from the defendant's Motion is any mention of
2 the **DNA evidence linking Gargiulo to the Maria Bruno crime scene** found on a blue bootie⁵
3 containing the victim's blood. Within minutes of the discovery of Maria Bruno's body,
4 detectives and responding officers discovered outside of Ms. Bruno's apartment door a blue
5 surgical bootie with three drops of Ms. Bruno's blood on it. The defendant's DNA profile was
6 also deposited around the elastic band of the bootie. It is clear that Gargiulo, in a demonstration
7 of his self-proclaimed expertise in forensic science, and in a chilling demonstration of planning
8 and premeditation, wore surgical booties during attack and mutilation of Ms. Bruno in order to
9 try to avoid detection. But that plan backfired when Gargiulo dropped the surgical bootie while
10 fleeing the crime scene. At the preliminary hearing, LASD Criminalist Susannah Baker testified
11 that she recovered the blue bootie from the concrete in the courtyard at the crime scene (PHT p.
12 731). LASD Criminalist and DNA expert Jamie Daughetee extracted DNA from three drops of
13 blood on the bootie (PHT p. 744) and she extracted DNA from the elastic band on the bootie
14 (PHT p. 744). LASD criminalist and DNA expert Susannah Knetchel (Jarvis) conducted DNA
15 analysis on the blood drops and determined the blood belonged to victim Maria Bruno (PHT p.
16 759) and she forwarded the DNA extract to DNA expert Angela Butler at SERI, a private DNA
17 laboratory, for YSTR analysis. Ms. Butler testified that she generated a Y-STR profile from
18 defendant Gargiulo's DNA sample, and generated the Y-STR profile she generated from the
19 swabbing of the elastic band on the blue bootie, and she determined they were a "match",
20 specifically that that DNA profile occurs zero times in 11,393 people. (PHT p. 876).
21
22
23
24
25
26

27 5 The same type of blue booties the defendant wore on the job (PHT p. 624, 639-40) and the same type found by
28 detectives hidden in the defendant's apartment crawl space (PHT p. 965).

1 The DNA evidence alone was more than sufficient to hold Gargiulo to answer on the
2 charge of murdering Maria Bruno, yet the defense failed to contend with that fact in its motion,
3 and instead saw fit to shift blame for the murder to Maria's husband, Irving Bruno. But DNA
4 evidence, coupled with evidence discussed herein, and the reasonable inferences to be drawn
5 from that evidence, clearly established Gargiulo had the motive, opportunity, means, and intent
6 to murder Ms. Bruno and did in fact murder her. Similarly, the totality of the remaining evidence
7 clearly established the defendant had the same motive, opportunity, means, and intent to murder
8 Ms. Ellerin, Ms. Pacaccio, and Ms. Murphy⁶ and an examination of the entire record points to
9 the perpetrator of the crimes committed against these four women being one and the same. Each
10 of these crimes shared undeniably remarkable common characteristics.
11

12 *A. The defendant lived a short distance from each of these victims which allowed him
13 to familiarize himself with each residence and surrounding area so that he may strike at only
14 the most opportune moment.*

16 Defendant lived down the street from Ms. Ellerin (PHT p. 58, 255, 530); in the same
17 complex and across the courtyard from Ms. Bruno (PHT p. 1189-90); lived in an apartment
18 which backed up to an alley he shared with Ms. Murphy's apartment (PHT p. 1024); and lived
19 one block from Ms. Pacaccio (PHT p. 926).
20

21
22
23
24
25
26

27 ⁶ Although the defense does not argue for dismissal of the count of Attempted Murder of Michelle Murphy, it is
28 necessary to discuss the overwhelming evidence of defendant's guilt pertaining to that charge (defendant's DNA
being left at the crime scene), and the similarities of the facts and circumstances of that crime to the murders of
Ms. Ellerin, Ms. Bruno and Ms. Pacaccio.

1 *B. The defendant targeted each victim, developed an unhealthy fondness for them, and*
2 *found a way to inject himself into their lives before their gruesome attacks.*

3 The defendant initiated the first contact with Ms. Ellerin, when he walked up and offered
4 to help her change a flat tire and later offered to help with heating issues she was having in her
5 home (PHT p. 49-52, 136, 139). Afterwards, the defendant would come to Ms. Ellerin's house
6 uninvited and unannounced (PHT p. 55, 77, 180) and would frequently call her (PHT p. 138).
7 The defendant was seen by multiple people parked in front of Ms. Ellerin's home just staring at
8 her residence for long periods of time (PHT p. 53-54, 77, 79, 248-250) and at all hours of the
9 day, including late nights (PHT p. 148, 155). Additionally, the defendant was seen sitting and
10 staring at Ms. Ellerin during a party as she mingled with guests shortly before her murder (PHT
11 p. 240). Ms. Ellerin's friends described defendant's behavior as "strange, weird, and stalkerish"
12 (PHT p. 93, 144).

15 Although Ms. Bruno only lived in her El Monte apartment for approximately one week
16 before she was murdered, the defendant claimed to have known her and knew personal details
17 of her life (PHT p. 1190). He was seen outside of her door, trying to open it, and looking through
18 her window (PHT p. 604-05, 1100-01, 1193). More troubling was when he was seen following
19 Ms. Bruno into her apartment and immediately backing out, moving backwards with his hands
20 out (PHT p. 602-604, 1193). Defendant told his girlfriend he knew Bruno, she was gorgeous,
21 knew she was separated, and remarked how fond he was of her breasts (which were targeted and
22 savagely mutilated in her murder) (PHT p. 629-30, 820).

25 Like Ms. Bruno, the defendant told somebody how much he liked Murphy (PHT p. 1079,
26 1082) and how much he wanted to get with her (PHT p. 1084-86). He was witnessed going out
27 of his way to contact and interact with Ms. Murphy (PHT p. 1080, 1087-88).

1 It goes without saying the defendant's familiarity with Ms. Pacaccio was developed
2 during adolescence through Ms. Pacaccio's brother Doug, whom the defendant was friends; and
3 even with this familial connection, Ms. Pacaccio was indifferent towards the defendant (PHT p.
4 925).

5

6 ***C. Each female victim shared similar physical attributes suggesting the killer had a***
7 ***"type" of victim he profiled and attacked.***

8 Ms. Ellerin was 5'4, 123 pounds, and was beautiful, outgoing, and flirtatious (PHT p. 58,
9 1034). Ms. Bruno was 5'2, 89 pounds, and was petite, pretty, large breasted and friendly (PHT
10 p. 581, 596, 1042). Ms. Murphy was short, blonde, small, and worked out in public areas, which
11 would not have gone unnoticed by the defendant (PHT p. 1005, 1080, 1088). Ms. Pacaccio was
12 young, 4'11, and 106 pounds (PHT p. 906).

13

14 ***D. Each crime was committed in an eerily similar manner and each victim was***
15 ***murdered in the same distinctive frenzied like attack with a knife.***

16 Each crime was committed with no evidence of a robbery being involved (PHT p. 522,
17 820, 822). Evidence suggests the perpetrator knew the victims and was familiar with the
18 locations allowing him easy access⁷ and mobility throughout the residences and the uncanny
19 ability to perfectly time when to strike.

20 Ms. Ellerin suffered numerous stab wounds, and a cutting of the neck that resulted in a
21 near decapitation (PHT p. 1033-34). Ms. Bruno suffered multiple stab wounds, had her breasts
22 removed, and, like Ms. Ellerin, her throat slashed severely (PHT p. 820, 1045). Ms. Murphy
23 suffered numerous stab wounds (PHT p. 1019-20) before she was able to fight off her attacker

24

25

26

27

28 ⁷ There was no sign of forced entry into Ms. Ellerin's home and both Ms. Bruno and Ms. Murphy were easily
accessible through the simple process of removing or cutting a screen on a window.

1 and Ms. Pacaccio suffered multiple stab wounds to her chest and shoulder, and like Ms. Ellerin
2 and Ms. Bruno, to her neck (PHT p. 534, 891-94).

3 *E. Various other testimony presented throughout the preliminary hearing, taken*
4 *on its own, might seem simply unusual, but taken in the totality of the entire record evidences*
5 *a strong suspicion the defendant is responsible for victimizing each of these women.*

7 Defendant went out of his way to continually report to multiple people that he was a
8 suspect in some of these murders. He spoke of being wanted in the murder of Pacaccio in
9 Chicago and the authorities were actively trying to find him (PHT p. 56, 654, 687, 718). Even
10 going so far to admit a role in that murder (PHT p. 719, 722). In addition, he discussed with
11 people that he was a suspect in Ms. Ellerin's murder (PHT p. 658, 674). In discussing these
12 matters, defendant had intimate details about both murders (PHT p. 717, 691).

15 The defendant exhibited behavior towards other women that was described as stalking,
16 frightening, and threatening. (PHT p. 661) Defendant even went so far to befriend a female in
17 the same apartment complex in which he lived and non-consensually held a knife to her throat
18 in an unprovoked and unwelcomed demonstration (PHT p. 112-13, 118). He also spoke of tazing
19 a woman he was on a date with (PHT p. 726).

21 The defendant had the access and means to commit these crimes. Defendant drove a van,
22 which contained, among other things, knives, booties, and binoculars (PHT p. 323-337). In
23 what was described as an uncomfortable incident, the defendant showed a friend of Ms. Ellerin's
24 a six or seven-inch knife he carried concealed on his shin (PHT p. 156).

26 The defendant professed to be knowledgeable about forensics and dead bodies (PHT p.
27 631, 655, 1097). He described having studied DNA, how it can be deposited and how it could
28

1 be used to capture suspects (PHT p. 658, 662, 1192). In addition to DNA, the defendant had
2 unusual opinions about serial killers and strong opinions about how they might be identified on
3 the basis of patterns – suggesting an awareness and a perceived ability to avoid detection (PHT
4 p. 1104). He physically reenacted knifings and slashings, and explained how physical evidence
5 could or could not establish an identifying signature based on characteristics of stab wounds
6 (PHT p. 1197-99). Finally he expressed real concern about the authorities' ability to locate and
7 collect physical evidence such as a baseball hat (Ms. Murphy's assailant and the individual who
8 walked into Ms. Bruno's apartment uninvited were wearing baseball hats) (PHT p. 1193-95).

9
10 The manner in which the defendant slashed Ms. Ellerin's throat is also shockingly similar
11 to the bizarre reenactment that he provided to undercover deputy Dana Duncan, who testified
12 that he observed the defendant walking from wall to wall in his jail cell muttering something and
13 as he slowly walked he had one hand out ahead of him and in crisp motions he reached out as if
14 he was grabbing around the face of someone and pulling it to the side. Then with his other hand
15 he reached up holding something that Detective Duncan assumed was a knife and began a
16 circular slicing motion around what would be the victim's neck area. (PHT p. 1199). This
17 reenactment during the Perkin's Operation is the same manner in which Gargiulo held a knife to
18 the throat of Ashley Green (Tarnow) (PHT p. 112-13, 118), is consistent with the manner in
19 which Gargiulo slashed Ms. Ellerin's and Ms. Bruno's throats, and is evidence of Gargiulo's
20 knowledge of the distinctive injuries caused to the victims, how those injuries were inflicted, and
21 amounted to his tacit admission to those knife attacks.

22
23 Finally, but no less important, the defendant talked of dreaming about committing acts
24 of mass violence (blowing up a police station – PHT p. 691) and told others that if ever accused
25
26
27
28

of a crime, "lie, lie, until you die" (PHT p. 693). And in the ultimate indicator of a consciousness of guilt, the defendant tried to escape and flee to Mexico (PHT p. 1201).

VII.

**THE PRELIMINARY HEARING MAGISTRATE
PROPERLY ADMITTED THE EVIDENCE CODE
SECTION 1101(B) EVIDENCE OF THE TRICIA
PACACCIO MURDER AND THE KNIFE ATTACK ON
ASHLEY GREEN-TARNOW FOR THE PURPOSE OF
SHOWING THE DEFENDANTS INDENTITY, INTENT,
AND MODUS OPERANDI, AND THE DEFENDANT IS
NOT ENTITLED TO A *DE NOVO* REVIEW OF THAT
EVIDENTIARY RULING**

A. Introduction

The prosecution presented at the preliminary hearing pursuant to Evidence Code section 1101(b) evidence of the uncharged Tricia Pacaccio murder in Chicago in 1993 and the defendant's assault on Ashley Tarnow-Green in 2002 in order to prove the defendant's identity, *modus operandi*, and motive in connection with the charged murders and attempted murder. The magistrate properly admitted that evidence and considered it in finding that the prosecution had met its low burden of a "strong suspicion."

B. The Magistrate's Evidentiary Ruling

After considering the prosecution's written motion and hearing oral argument from both sides, the magistrate, Judge Michael Johnson, admitted that evidence, ruling as follows as to the Tricia Pacaccio murder (PHT p. 14):

2 AS FOR THAT, MY RULING IS AS FOLLOWS:
3 YOU'RE WELCOME TO ADDRESS THESE SPECIFICS AFTER
4 I'VE GIVEN IT.
5 FIRST OF ALL, THE BURGLARY AND MURDER OF TRICIA
6 PACACCIO OF AUGUST 14, 1993, WHICH IS UNCHARGED, I WOULD
7 ADMIT THAT AS TO IDENTITY, COMMON MODUS OPERANDI WITH
8 COUNTS 5, 3 AND 1, AND ALSO COMMON MOTIVE.

1 Judge Johnson also ruled as follows with regard to the knife attack on Ashley Tarnow-
2 Green:

3 25 NEXT IS THE INCIDENT REGARDING ASSAULT WITH A
4 KNIFE UPON ASHLEY GREEN SOMETIME IN 2002. IT'S NOT
5 CLEAR WHAT MONTH. I WOULD ADMIT THAT REGARDING IDENTITY
6 AND MODUS OPERANDI BECAUSE OF SIMILARITIES WITH COUNTS

7

8 1 1, 3 AND 5. ALSO ADMIT THAT REGARDING MOTIVE.

9

10 C. *The Evidentiary Ruling of the Magistrate is Binding*

11 The defense now moves the court pursuant to Penal Code section 995 for this reviewing
12 court to reconsider the magistrate's evidentiary ruling *de novo* and to otherwise disregard that
13 evidence, although providing no legal authority as to why the court is authorized to take such
14 action. It is well-settled that in passing on hearsay and other evidentiary questions presented by
15 the magistrate's determination to hold an accused to answer, the Superior Court is not free to
16 conduct *de novo* review; rather, the reviewing court in a Penal Code section 995 motion sits
17 merely as a reviewing court that must draw every legitimate inference in favor of the information,
18 and cannot substitute its judgment as to credibility or weighing of the evidence for that of the
19 magistrate. (*People v. Daily* (1996) 49 Cal. App. 4th 543).

20

21 VIII.
22 CONCLUSION

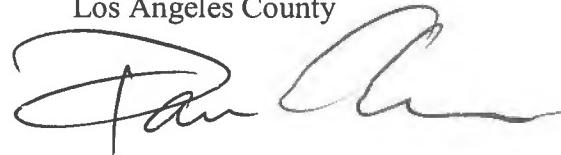
23 The showing required at a preliminary hearing is exceedingly low. (*People v. Salazar*
24 (2000) 83 Cal. App. 4th 840). Here, the totality of the direct and circumstantial evidence from
25 the preliminary hearing record goes well-beyond the standard required that some rational ground
26 exists to believe the offenses were committed by Gargiulo, and actually presents compelling
27

1 evidence that Gargiulo is a serial, sexual-thrill killer who murdered Tricia Pacaccio, Ashley
2 Ellerin, Maria Bruno and tried to murder Michelle Murphy, all in the same horrific, unique,
3 distinct, and eerily similar way. Further, Gargiulo's statements made during the Perkins
4 Operation in no way violated Gargiulo's Constitutional rights and were properly admitted by the
5 magistrate. The People respectfully request that the Gargiulo's motion to set aside information
6 under Penal Code Section 995 be denied.
7

8 DATED: July 13, 2015

Respectfully Submitted,

9
10 JACKIE LACEY
11 District Attorney of
12 Los Angeles County



13
14 DAN AKEMON
15 Deputy District Attorney



16
17 GARRETT DAMERON
18 Deputy District Attorney



1

2 **DECLARATION OF SERVICE BY MAIL**

3

4 The undersigned declares under the penalty of perjury that the following is true
5 and correct:

6 I am over eighteen years of age, not a party to the within cause and employed in
7 the Office of the District Attorney of Los Angeles County with offices at 210 W. Temple Street,
8 Los Angeles, California 90012. On the date of execution hereof I served the attached document
9 by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully
10 prepaid in the United States mail in the County of Los Angeles, California, addressed as follows:

11

12 *Charles Linder, Esq.*
13 *2801 Ocean Park Blvd.*
14 *Suite 247*
15 *Santa Monica, CA 90405*

16 *Dale Rubin, Esq.*
17 *2275 Huntington Dr # 902*
18 *San Marino, CA 91108*

19 Executed on this 13th day of July, 2015, at Los Angeles, California.

20 
21 DAN AKEMON